IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

QUESTIONS PRESENTED

I. Should the Court have refused to exercise jurisdiction in this case under the abstention doctrine?

II. Does WIS. STAT. sec. 245.10 violate the right of plaintiffs to equal protection of the law?

III. Does WIS. STAT. sec. 245.10 violate the right of plaintiffs to due process of law?

IV. Was the District Court correct in holding that notice was not required for absent defendant class members?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on August 31, 1976, by order of a three-judge District Court, declaring WIS. STAT. sec. 245.10(1), (4) and (5) (1973) unconstitutional and enjoining its enforcement.

On May 12, 1972, appellee Roger G. Redhail was adjudged by the Milwaukee County Court, Civil Division, to be the father of a child born out of wedlock. He was ordered to pay $109 per month as support until the child reaches eighteen years of age, plus court costs. (A. 21).

At the time of his admission of paternity, Redhail was a minor and a high school student. From May, 1972, until August, 1974, he was unemployed, indigent, and unable to pay any support. He therefore made no payments and as of December 24, 1974, there was an arrearage in excess of $3,732. (A. 21).

Redhail's child has been a public charge since birth and receives welfare benefits in excess of $109 per month. Therefore, the child would be a public charge even if Redhail were current in his court ordered support payments. (A. 21).

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and therefore is responsible for the issuance of marriage licenses in Milwaukee County. WIS STAT. sec. 245.05 (1975). On September 30, 1974, Redhail was denied a marriage license by an agent of Zablocki solely because he

did not have a court order granting him permission to marry as required by sec. 245.10(1). (A. 22).

Under sec. 245.10(1), persons who have minor issue not in their custody which they have been ordered to support may not be issued a marriage license unless a court grants them permission to marry. Permission to marry must be withheld unless the marriage license applicant submits proof that she or he has complied with the support order and the issue is not likely to become a public charge. (A.22). WIS. STAT. sec. 245.10(1), (4) and (5) are set forth in the Brief of Appellant, 3-5.

Plaintiff Redhail was unable to submit such proof and therefore could not obtain permission to marry. Redhail did not petition the state court for permission to marry. (A.22).

The complaint in this action was filed December 24, 1974. The three-judge court was convened pursuant to 28 U.S.C. 2284 on January 6, 1975. Notice was given to the Governor and the Attorney General as required by 28 U.S.C. 2284 (2), and the defendant subsequently filed his answer. (A. 16-19).

On February 18, 1975, plaintiff filed a motion seeking to have the action maintained as a class action on behalf of all persons subject to the provisions of sec. 245.10, and against a class consisting of all county clerks in the State of Wisconsin. On February 20, 1975, the action was certified as a class action pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure, on behalf of the class of plaintiffs. The class was defined as:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to sec. 245.10(1), WIS. STATS." (A. 19-20).

The order of February 20, 1975, also established a briefing schedule on the issue of the certification of the defendant class. (A. 20). Plaintiffs filed a brief on the issue. (A. 2). Neither defendant Zablocki nor the Wisconsin Attorney General did so.

A Statement of Uncontested Facts and briefs on the merits were filed, and oral argument was held on June 23, 1975. (A. 2).

On August 31, 1976, the action was certified by the District Court as a class action against the defendant class of county clerks pursuant to Rule 23(b) (2). The defendant class was defined as follows:

> "All county clerks within the State of Wisconsin, all of whom are required by sec. 245.10(1), WIS. STATS., to refuse to issue marriage licenses to the class of plaintiffs without court order." (A. 2-3).

On the same date the District Court issued its decision declaring sec. 245.10(1), (4), and (5), unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and enjoining its enforcement by defendant county clerks. Defendant Zablocki was ordered to mail a copy of the opinion, order and

judgment to all members of the class he represents. Judgment was entered and copies thereof were mailed to the parties. (A. 3).

SUMMARY OF ARGUMENT

I. This action falls within none of the three categories of cases which could make the exercise of the doctrine of abstention appropriate.

The state statute in question is not ambiguous but is clear in its meaning and effect. Therefore, the doctrine announced in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941) is not applicable.

The type of abstention which in a limited number of cases has been applied to promote comity between the state and federal governments is inappropriate for application here. The Court's decisions in Burford v. Sun Oil Company, 319 U.S. 315 (1943), and Reetz v. Bozanich, 397 U.S. 82 (1970), are inapposite. The exercise of jurisdiction by the District Court caused little confusion or disruption in the operation of Wisconsin's statutory scheme for the regulation of domestic relations. There are no complex or ambiguous issues of fact or law present. Wisconsin has no interest in domestic relations which is not shared by other states. The fact that the statute in question involves domestic relations did not warrant abstention by the District Court. See, e.g. Sosna v. Iowa, 419 U.S. 393 (1975); Boddie v. Connecticut, 401 U.S. 371 (1971).

The doctrine enunciated by this Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) does not apply because there were no state court proceedings commenced. Wooley v. Maynard, ____U.S. _____, 45 U.S.L.W. 4379 (dec'd. April 20, 1977).

II. The legislative classification created by sec. 245.10 must be subjected to strict judicial scrutiny because it substantially abridges the right to marry, a right which is included within the right of privacy. Roe v. Wade, 410 U.S. 113 (1974); Loving v. Virginia, 388 U.S. 1 (1967). In addition, sec. 245.10 results in many plaintiffs being completely denied the right to marry because of their poverty. This wealth discrimination provides an additional justification for applying the strict scrutiny standard under the test articulated in San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973).

The strict scrutiny test provides appropriate protection for the competing interests of Wisconsin and the individual. In other cases involving domestic relations the Court has carefully considered these competing interests. See, e.g. Sosna v. Iowa, 419 U.S. 393 (1975); Stanley v. Illinois, 405 U.S. 645 (1972).

The purpose of sec. 245.10, clear from the face of the statute itself, is to prevent the marriage of poor members of the plaintiff class. The denial of a constitutional right is not a legitimate state purpose. Shapiro v. Thompson, 394 U.S. 618 (1969). Other arguable statutory purposes are enforcing the parental duty to support, assuring that children do not become public charges and requiring

counseling of plaintiffs and their intended spouses. But the State has numerous effective ways of accomplishing these purposes which do not abridge the right to marry. Section 245.10 is not even rationally related to these purposes because the only result of the operation of the statute is to grant or deny permission to marry. Therefore, sec. 245.10 violates the Equal Protection Clause.

III. Because the right of privacy is a liberty protected by the Due Process Clause of the Fourteenth Amendment, Roe v. Wade, 410 U.S. 113 (1974), many decisions protecting the right of privacy from unnecessary interference by the state have relied on due process grounds. E.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Because all possible permissable objectives of sec. 245.10 can be accomplished without infringing upon the right to marry, sec. 245.10 deprives plaintiffs of liberty without due process of law.

IV. The representative defendant requests that this Court reverse the judgment of the District Court because the unnamed defendants were not given formal notice of the proceedings. No case or controversy exists under Article III of the Constitution between the named defendant and the plaintiffs because the named defendant received notice and participated in the entire litigation. He therefore has no "personal stake in the outcome." Baker v. Carr, 396 U.S. 186 (1962).

Neither Fed. R. Civ. P. 23 nor the Due Process Clause mandate that notice be given to all members of every 23(b)(2) class. Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974); Hansberry v. Lee, 311 U.S. 32 (1940).

An analysis of the facts present in this case leads to the conclusion that notice to all unnamed defendant class members was not required under either the Due Process Clause or Rule 23. The interest of all absent class members in the action was identical to that of the representative party. The absent class members were adequately represented. In implementing the statute, each class member was acting as an agent of the State. Therefore representation by the Wisconsin Attorney General was most appropriate.

Because of the cohesiveness and unity existent in this class of defendants and the effectiveness of the representation provided, notice to the unnamed members was not required.

ARGUMENT

I. THIS IS NOT A PROPER CASE FOR ABSTENTION.

There are three general categories of cases in which the equitable doctrine of abstention may be exercised by the federal district courts. Colorado River Water Conservation District v. United States, 424 U.S. 813-815 (1976). If a case falls within one of the three categories the court must then carefully consider the facts and apply the doctrine only in special circumstances. Harris County Commissioners Court v. Moore, 420 U.S. 77, 83 (1975). The case at bar falls within none of the categories which would make application of the doctrine appropriate.

A. The statute in question is not ambiguous.

In Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941), the Court held that when a federal constitutional claim is premised on an ambiguous provision of state law the federal court should abstain in order to avoid both needless litigation of federal constitutional issues and federal court error in the interpretation of state law questions. Id. at 501. The doctrine and its rationale remain substantially unchanged. Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572 (1976). Although counsel opposed apparently argue that this Court should direct the District Court to abstain under the Pullman doctrine (Brief of Appellants, 16) they point to no ambiguity in sec. 245.10, the statute in question.[1] In fact, in the Statement of Uncontested Facts at 22-23 which was submitted to the District Court, defendants stipulated to the clear meaning of the statute. They reiterate the statute's clear meaning and the effect of its operation on plaintiffs in their brief, at 16-17. Defendants have pointed to no ambiguity

[1]Defendants did not raise the Pullman abstention issue in the District Court. In previous decisions upholding the refusal of district courts to abstain, this Court has considered a party's failure to request the district court to apply the doctrine. Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 329 (1964); accord, Lehman Brothers v. Schein, 416 U.S. 386, 393 (1974) (Rehnquist, J. concurring).

because there is none in the statute.[2] Therefore, the Pullman doctrine does not apply.

B. Considerations of comity do not weigh in favor of abstention.

In a limited number of cases the Court has ruled that abstention is appropriate to promote comity between the federal and various state governments. Colorado River Water Conservation District v. U.S., 424 U.S. at 814-816. Defendants argue that the present case is one in which the comity type of abstention is appropriate,[3] citing Burford

[2]With due respect, plaintiffs submit that perhaps defendants misunderstand the Pullman abstention doctrine, for they argue at p. 17 of their brief that sec. 245.10 is "constitutionally uncertain", rather than uncertain in its meaning. There is of course no requirement that federal courts abstain from ruling on the federal constitutionality of a state statute which is clear in meaning simply because the statute is constitutionally uncertain. Lake Carriers' Association v. MacMullan, 406 U.S. 498, 511 (1972). Indeed this Court has noted on many occasions that under our dual system of government the federal judiciary is the primary arbiter of federal constitutional questions. E.g. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-416 (1964); Zwickler v. Koota, 389 U.S. 241, 245-252 (1967). Plaintiffs welcome defendants' candid admission that sec. 245.10 is constitutionally uncertain.

[3]Defendants failed to raise the comity-based abstention issue in the District Court. See plaintiffs' brief, p. 10, f.n. 1.

v. Sun Oil Company, 319 U.S. 315 (1943), and Reetz v. Bozanich, 397 U.S. 82 (1970). Each of these cases is easily distinguishable from the one at bar.

In Burford a district court in Texas was asked to exercise its diversity jurisdiction to rule on the reasonableness of a Texas administrative agency's determination concerning the rights of private litigants in oil and gas fields. This Court held that the District Court should have abstained because of Texas' peculiar interest in its natural resources, the complex legal and factual issues involved, the District Court's comparative lack of expertise concerning those issues, the fact that Texas had established its own administrative/judicial system to resolve the problems, and the disruptive effect inconsistent federal court decisions would have on the state policy and economy of Texas. Burford, 319 U.S. at 327-334. In Reetz, plaintiffs sued in the Alaska federal District Court alleging that an Alaska statute deprived them of rights under both the Alaska and Federal Constitutions. In ruling that abstention was appropriate, this Court noted that Alaska had a unique concern for its fish resources, that there was an apparent conflict between the state constitution and the statutes in question, both of which related to fishing rights, and that resolution of the conflict between the provisions of state law could obviate the need to resolve the federal constitutional question. Reetz, 397 U.S. at 84-87.

None of the factors the Court considered in Burford and Reetz weigh in favor of abstention in this case. Here there are no complex issues of fact or state law. The only issue of complexity concerns the constitutionality of the unambiguous state statute. This militates against abstention, for the federal courts have the primary role in deciding federal constitutional questions. England v. Louisiana State Board of Medical Examiners, 375 U.S. at 415-416. Unlike the situation in Burford, the statute in question here is severable from Wisconsin's comprehensive statutory scheme concerning domestic relations and there is no administrative system for its enforcement. Therefore, the exercise of jurisdiction by the District Court left undisturbed the remainder of Wisconsin's statutory scheme for domestic relations.

The only point which defendants have advanced in support of their contention that the District Court should have abstained in the interest of comity is the fact that the statute in question is a part of Wisconsin's regulation of domestic relations. Wisconsin does have a strong interest in the domestic relations of its citizens. But that interest is not peculiar to it, as was Alaska's in fishing rights in Reetz or Texas' in oil and gas rights in Burford.

Defendants cite Sosna v. Iowa, 419 U.S. 393 (1975), in support of their argument that the District Court should have abstained in the interest of comity. On the contrary, Sosna is supportive of plaintiffs' position. The Court found no fault with the lower court's exercise of its jurisdiction to determine the constitutionality of an Iowa domestic relations statute. This type of abstention was not even mentioned by the Court. Neither was the doctrine mentioned in Boddie v. Connecticut, 401 U.S. 371 (1971), the only other recent decision in

which this Court reviewed a judgment of a lower federal court concerning the constitutionality of a state domestic relations statute. Further, plaintiffs have been unable to find a single circuit or district court opinion which held the comity-based abstention doctrine a bar to the exercise of its jurisdiction to review the constitutionality of a state statute solely because the statute concerned domestic relations.

This Court has frequently noted the harm done to litigants when district courts delay the exercise of their jurisdiction under the abstention doctrine. Zwickler v. Koota, 389 U.S. 241, 251 (1967). The cost is considerable in terms of money, time and uncertainty. This suit was started more than twenty-eight months ago. Until the litigation is resolved the marital rights and status of the named plaintiff and the class of persons he represents will be in doubt. The defendants did not even raise the question of the applicability of this equitable doctrine in the lower court. Taking all relevant factors into consideration, the extraordinary exception to federal jurisdiction should not be invoked.

C. The Younger-Huffman doctrine is not applicable.

The Court has ruled that special considerations of federalism and comity come into play when a federal district court is asked to intervene in a pending state court proceeding. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Juidice v. Vail,

____U.S. ____, 45 U.S.L.W. 4269 (dec'd. March 22, 1977); Wooley v. Maynard, ____U.S. _____, 45 U.S.L.W. 4379 (dec'd. April 20, 1977). Defendants have cited Huffman in support of their argument that the District Court should have abstained. (Brief of Appellants, 16).[4] The doctrine announced in Younger v. Harris, 401 U.S. 37 (1971), and later held applicable to civil proceedings in Huffman and Juidice is not applicable here because no state court proceeding has ever been commenced.[5]

II. THE CLASSIFICATION CREATED BY SEC. 245.10 VIOLATES PLAINTIFFS' RIGHTS TO EQUAL PROTECTION OF LAW.

A. Section 245.10 substantially burdens plaintiffs' right to marry.

Section 245.10, Wisconsin's "permission to marry" law, creates two groups of adult, healthy, competent Wisconsin residents who wish to marry. One group, the plaintiff class, is composed of those persons who have minor children not in their

[4]The manner in which defendants framed the second of the Questions Presented (Brief of Appellants, 6) might lead the Court to believe that the District Court did not consider the applicability of Huffman to the case at bar. On the contrary, this question was briefed and fully considered by the District Court. (Appendix to Jurisdictional Statement, 3-5).

[5]Presuming that plaintiffs could have brought an action in state court to raise their federal constitutional claims, this Court has frequently and recently made clear that even when a state remedy is available there is no requirement that litigants

custody whom they are under a court-ordered obligation to support. These persons must obtain the permission of a court before they can lawfully marry in Wisconsin or elsewhere. Other persons need not undergo this procedure.

In order to obtain permission to marry, class members must file a verified petition with one of several courts. The person wishing to marry must give notice of the proceeding to the custodian of the minor child or children and, if the issue was of a previous marriage, to the family court commissioners of the county where the divorce was granted and of the county where permission to marry is being sought. A full financial disclosure must be made to the court. Ordinarily a hearing is held at which both parties to the intended marriage must appear. The class member must prove compliance with the prior support order and must also prove that the child or children are not now and are not likely to become public charges. If the class member can prove both elements, permission to marry must be granted; it not, permission must be withheld.[6]

The statute is enforced in several ways. Wisconsin county clerks may not issue a marriage license to class members unless they have obtained a court order granting permission to marry.[7] Class members who wish to marry outside the State of Wisconsin must first obtain the permission

(footnote 5 cont'd)
go first to state court before they can raise constitutional issues in federal court. Lake Carriers' Association v. MacMullan, 406 U.S. at 510; Zwickler v. Koota, 389 U.S. at 248.

[6]WIS. STAT. sec. 245.10(1) (1975)

[7]WIS. STAT. sec. 245.10(1) (1975)

of a Wisconsin court or the marriage will be void.[8] In addition, class members who marry without permission are subject to criminal penalties.[9]

It is plain that the classification created by sec. 245.10 substantially burdens the right of plaintiff class members to marry. All must endure the delay, expense and uncertainty of the statutory procedure as well as meet the requirement of full financial disclosure. Many, such as Roger Redhail, are unable to marry anywhere as long as they remain residents of the State of Wisconsin because they are indigent or have limited income. If Redhail were to petition for permission to marry, permission would be denied because, due to his indigency, he has been unable to satisfy the support obligation ordered in the paternity action. Furthermore, even if he had fully complied with the prior support order or could somehow pay the arrearage due, permission to marry would still be denied because his child receives welfare benefits in excess of the $109 per month support obligation and therefore would remain a public charge.

The permission to marry statute restricts the rights of others besides plaintiffs. Men or women who want to marry a member of the plaintiff class are subject to the same burden as plaintiffs themselves. They must generally participate in the statutorily required procedure and suffer the delay

[8]WIS. STAT. sec. 245.10 (4), (5) (1975)

[9]WIS. STAT. sec. 245.30(1)(f) (1975)

and uncertainty it entails. If permission to marry is denied, they are deprived of their right to marry as completely as are plaintiffs.[10]

B. Strict scrutiny is the proper test for determining whether the classification created by sec. 245.10 denies plaintiffs equal protection.

This Court's equal protection analysis requires that a legislative classification which interferes with the exercise of a fundamental right or discriminates against a suspect class be subjected to strict judicial scrutiny. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-313 (1976); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The legislative classification created by the permission to marry law interferes with the fundamental right to marry of both plaintiff class members and the people who wish to marry them. Additionally, the statute presents the type of wealth discrimination which this Court has held must be strictly scrutinized.

1. The right to marry is a fundamental right.

In decisions spanning over fifty years, this Court has recognized that the right to marry is a fundamental right of citizens, encompassed by and perhaps basic to the right of personal privacy guaranteed by the United States Constitution.

The right of privacy is not explicitly guaranteed by the Constitution. Yet this Court has repeatedly held that certain zones of privacy do exist under the

[10] This analysis is similar to the Court's analysis of First Amendment issues in Procunier v. Martinez, 416 U.S. 396 (1974).

Constitution. See Roe v. Wade, 410 U.S. 113, 152-153 (1973) and cases cited therein. The right of privacy is now recognized as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action". Id. at 153.

One facet of this right of privacy is the right of freedom of choice in family matters. Citizens have a right to be free from undue state interference in their decisions on whether and whom to marry, whether to have children, and how their children should be raised and educated. Paul v. Davis, 424 U.S. 693, 713 (1976).

Plaintiffs submit that the right to marry is the most basic of the privacy rights. In our society, marriage is regarded as the foundation of the family.

In a long line of decisions, this Court has emphasized that marriage is a fundamental right in a free society. In 1923, the Court held that:

> "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). [emphasis supplied].

In 1942, the Court held that an Oklahoma statute allowing sterilization of "habitual criminals" was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court subjected the statutory classification to strict scrutiny because:

> "We are dealing here with legislation which involves one of the basic rights of men. Marriage and precreation are fundamental to the very existence of the race." 316 U.S. at 541.

The inclusion of the marital relationship among fundamental rights was again noted in Griswold v. Connecticut, 381 U.S. 479 (1965). In that case a statute forbidding the use of contraceptives was held invalid as a violation of the right to marital privacy. Mr. Justice Douglas, writing for the majority, stated:

> "We deal here with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred . . . [I]t is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

Goldberg, J. concurring wrote:

> "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." 381 U.S. at 496.

In Loving v. Virginia, 388 U.S. 1 (1967), the Court considered the constitutionality of Virginia's miscegenation statutes, which restricted the right of the individual to marry the person of his or her choice. In addition to ruling that the statutes violated the Equal Protection Clause, the Court held that they deprived the Lovings of liberty without due process of law in that:

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State." 388 U.S. at 12. (cites omitted).

The decisions in Boddie v. Connecticut, 401 U.S. 371 (1971) and United States v. Kras, 409 U.S. 434 (1973) provide further support to plaintiffs' position.

In Boddie, plaintiffs maintained that state statutes which prevented indigents from getting a divorce without paying filing fees was unconstitutional. The Court agreed. Citing Skinner v. Oklahoma and Loving v. Virginia, the Court noted

that the state has monopolized the means for legally dissolving the marital relationship, and the individual is unable to free himself ". . . from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without involving the state's judicial machinery." 401 U. S. at 376.

In United States v. Kras, the issue was whether the United States could constitutionally deny a discharge in bankruptcy to indigents who were unable to pay the filing fee. Boddie was distinguished as follows:

> "The denial of access to the judicial forum in Boddie touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. The Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue their protected associational activities." 409 U. S. at 444-445. (cites omitted).

In Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974), the Court again held that "Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id. at 639-640.

These decisions make it clear that the right to marry is a fundamental right.[11]

2. Section 245.10 creates a suspect classification based on wealth.

Section 245.10 imposes a substantial burden on all plaintiff class members and the people they wish to marry. For poor and low-income persons however, the burden is much more severe. If Roger Redhail had petitioned for permission to marry, permission would have been denied since, because of indigency, he had not been able to comply with the support order made in the paternity action. Even if he had complied fully or was able somehow to pay the arrearage, permission would still have been denied because his child receives welfare benefits in excess of the court-ordered support.[12] Plaintiffs in Redhail's position, those who are too poor to pay existing arrearages or enough support

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[11] Lower courts which have decided the issue have held unanimously that any interference with the right to marry must be strictly scrutinized. Pederson v. Burton, 400 F. Supp. 960, 962 (D. D. C. 1975); O'Neill v. Dent, 364 F. Supp. 565, 568-569 (E. D. N. Y. 1973); Holt v. Shelton, 341 F. Supp. 821, 822-832 (M. D. Tenn. 1972).

[12] The plaintiff in the companion case, Leipzig v. Pallamolla, 418 F. Supp. 1073 (E. D. Wis. 1976), had complied with his support obligation but was denied permission to marry because his four minor children received AFDC benefits.

to assure that their children are not and are not likely to become public charges, are barred from marrying. This wealth discrimination inherent in the statute provides an additional ground for applying the standard of strict scrutiny.

Legislation which affects the poor more severely than the affluent is common; this unequal effect is unavoidable and in itself does not invoke the strict scrutiny test. San Antonio Ind. School District v. Rodriguez, 411 U.S. 1, 29 (1973). However, classifications based on wealth have been strictly scrutinized and overturned in the area of voting and elections, Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1963); Kramer v. Union Free School District, 395 U.S. 621 (1969); criminal procedure, e.g. Douglas v. California, 372 U.S. 353 (1963); and incarceration, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

In San Antonio Ind. School District v. Rodriguez, this Court reviewed its prior decisions and articulated the distinguishing characteristics of wealth discrimination which must be strictly scrutinized.

> "The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20.

These characteristics are present with respect to Roger Redhail and many other class members who are too poor either to satisfy their support obligations or to pay enough support to assure that their children will not be public charges. Because of their poverty, Wisconsin denies those class members the right to marry and lawfully have and raise children together. Therefore the statute does more than unequally affect the poor; it absolutely deprives them of the right to enjoy the fundamentally important benefits of marriage and family life.

3. Classifications affecting the right to marry should not be excepted from the strict scrutiny test.

Defendants concede that the right to marry is a fundamental right. (Jurisdictional Statement, 7). They argue, however, that marriage requirements should be excepted from the strict scrutiny test normally employed when a fundamental right is abridged. They ask this Court to apply the rational relationship test because domestic relations are traditionally within the control of the states. This argument is without merit.[13]

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[13]There is a line of cases which holds, often in sweeping language, that federal courts do not have diversity jurisdiction to grant divorces or alimony or to determine questions of child custody. See e.g. Barber v. Barber, 21 How. 582, 584, 16 L. Ed. 226 (1859); Ex Parte Burrus, 136 U.S. 586 (1890); Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930). This rule, which was based upon the historical limits of English equity jurisdiction, see Spindel v. Spindel, 283 F. Supp. 797 (E.D. N.Y. 1968), has no relevance to the case at bar which seeks protection of federal constitutional rights.

In our federal system, many areas of law are within the province of the states. Yet the states' power to regulate is limited by the United States Constitution. Indeed, the purpose of the Bill of Rights and the Fourteenth Amendment is to protect the interests of the individual or group of individuals from overzealous regulation and control by the government.

There is no question that the states have a vital interest in the domestic relations of their citizens. There is also no question that the right to marry is of fundamental importance to the individual and is one of the liberties protected by the Fourteenth Amendment. Where fundamental individual rights are abridged, the Court carefully considers the interests of both the individual and the state. The state may abridge fundamental rights but only if necessary to accomplish a compelling state purpose. Defendants' contention that a legislative classification which infringes upon the right to marry must be upheld unless arbitrary or unrelated to the achievement of a legitimate state purpose ignores the individual interests involved in marriage.

In numerous cases involving regulation of the broad area of domestic relations, this Court has carefully considered and weighed the competing interests of the state and the individual. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 66-72 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). In all of these cases, the Court held that the state's interest in regulating domestic relations did not justify the restriction of individual rights.

Sosna v. Iowa, 419 U.S. 393 (1975), which involved a challenge to Iowa's one year durational residency requirement for divorce, reached a different result, but again only after a careful consideration of the interests of the state and of the individual. While the Court did not expressly state the equal protection test it applied in upholding the Iowa statute, it noted the effect of the statute on persons who had recently exercised their right to travel was different than that of the statutes considered in Shapiro v. Thompson, in that persons were not irretrievably foreclosed from obtaining at least some part of what they sought. 419 U.S. at 406. It also noted that the statute promoted several very substantial state interests. Id. at 406-409. These factors - the relatively insubstantial burden upon individual rights weighed against the very substantial state interests - underlie the Court's decision in Sosna. The Court did not apply the more lenient equal protection test.[14]

Defendants argue that all marriage requirements would be struck down if the strict scrutiny test is applied. (Brief of Appellants 14). This is simply untrue. Reasonable age and competency requirements are necessary to assure that people in fact consent to enter into the marriage contract.

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[14]Furthermore, Sosna involved the right to seek immediate dissolution of marriage, not the right to marry. While the two areas are indirectly related they are not identical. All states closely regulate who may seek a divorce from its courts, the procedure required in a divorce action and for what causes a divorce may be granted. Forty-eight of the fifty states have some sort of durational residency requirement. 419 U.S. at 404.

Reasonable fee and flexible solemnization requirements are not a substantial burden on the right to marry and therefore do not amount to constitutional violations. Health requirements such as Wisconsin's which are narrowly drawn so that only those persons with active, communicable venereal disease may not marry, WIS. STAT. sec. 245.06-.07 (1975), could certainly withstand strict scrutiny. Defendants' argument that state regulation against polygamy could not meet the strict equal protection standard is frivolous. Marriage has always been defined in this society as the union of one man and one woman. See Reynolds v. United States, 98 U.S. 145 (1878).

C. Section 245.10 cannot withstand strict scrutiny.

The strict scrutiny test is demanding; the state bears the burden of showing that the statutory classification promotes a legitimate and compelling state interest and that the statute is "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155; Shapiro v. Thompson, 394 U.S. at 634.

The first step in the analysis is to determine what interests Wisconsin seeks to promote by the permission to marry law. Defendants argued in the District Court that sec. 245.10 promotes two state interests: providing counseling to prospective marriage partners regarding the pre-existing support obligation, and protecting the welfare of children. Appendix to Jurisdictional Statement 15 (hereafter "A.J.S."). In this Court, they argue that "It should be apparent that the principal governmental interest is in the welfare of children, that provision for such children should be accommodated before new marital obligations are undertaken." (Brief of Appellants, 12).

This Court has left open the question of whether it should accept the statement of a state's Assistant Attorney General as to the objectives of the legislature or whether it "must determine if the litigant simply is selecting a convenient, but false, post-hoc rationalization." Craig v. Boren, ____U.S. _____, 97 S.Ct. 451, 458 n.7 (1976). In view of the shifting and rather vague statutory objectives claimed by the defendants in this case, plaintiffs submit that the Court should carefully examine the statute itself and the little available legislative history to determine the legislative purpose.

There is some evidence that the intention of the Committee which drafted sec. 245.10 was to provide counseling. The forerunner of the present statute was introduced into the Wisconsin Assembly in 1959 by the Wisconsin Legislative Council as part of Bill No. 151A, a comprehensive revision of Wisconsin's Family Code. Section 245.10 as introduced was a simple provision which required that persons with court-ordered support obligations to minor issue of a prior marriage obtain court approval before obtaining a marriage license.[15] The notes of the drafting committee explained the purpose of the provision as follows:

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[15] "Approval of Judge required in certain cases. When it appears that either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the approval of a judge of a court having divorce jurisdiction in the County of application." Bill No. 151A, Sec. 245.10.

"Several recommendations made by the committee are based on the principle that the process of getting married should be in accord with the seriousness of marriage. This principle is reflected in the following proposal: . . . (3) Divorced persons who have support obligations to children of a former marriage must obtain judicial consent to remarry. This provides an opportunity to counsel such person particularly when he has failed in fulfilling present obligations. His intended partner will also be aware of these obligations before the marriage. The provision, of course, is not designed to preclude the contemplated marriage but merely assure that there is an awareness of the situation." Wisconsin Legislative Council - General Report, Vol. 5, 1959.

However, WIS. STAT. sec. 245.10 (1959) as enacted into law by the Wisconsin Legislature was substantially amended. Besides providing a procedure for obtaining court permission to marry, it required the applicant to prove either compliance with the previous support order or good cause why the permission should be granted, and made any order withholding permission to marry an appealable order. [16]

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16 "245.10 Permission of judge required in certain cases. When it appears that either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the written permission of a judge of a court having divorce jurisdiction in the county of application. The judge shall, within 5 days after any such permission is sought, either grant the same or

In 1961, the statute was again amended. The requirement that the marriage license applicant prove that the children are not and are not likely to become public charges was added and the court's discretion to permit the marriage for "good cause" was deleted. [17]

(footnote 16 cont'd)

order a court hearing in the matter to allow said applicant to furnish proof of his compliance with such prior court obligation. The judge may allow the admission of other pertinent evidence. Upon the hearing, if said applicant furnishes such proof, or shows good cause why a marriage license should be issued to him in the absence thereof, the court shall grant such permission; otherwise permission for a license shall be ordered withheld until such proof is furnished or good cause shown, but any court order withholding such permission shall be deemed an appealable order." WIS. STAT. sec. 245.10 (1959).

17 "245.10 Permission of court required for certain marriages. When either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the order of a court having divorce jurisdiction in the county of application. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall either grant such order or direct a court hearing to be held in the matter to allow said applicant to submit proof of his compliance with such prior court obligation. No such order shall be granted, or

In 1969, the statute was further amended to require parents of out of wedlock children as well as divorced parents to obtain court permission to marry.[18]

The Committee notes indicate that the purpose of the statute as introduced was to provide mandatory counseling, but there are no materials to establish or shed light upon the legislative purpose of sec. 245.10 as enacted or as amended. However,

(footnote 17 cont'd)

> hearing held, unless both applicants for such license appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of such petition at least 5 days prior to the court order or hearing, unless such appearance or notice has been waived by the court upon good cause shown. Upon the hearing, if said applicant submits such proof and makes a showing that such children are not and are not likely to become public charges, the court shall grant such order, a copy of which shall be filed in any prior divorce action of such applicant in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and showing is made, but any court order withholding such permission is an appealable order. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere." WIS. STAT. sec. 245.10 (1961).

[18]Other amendments, not directly relevant to the issues in this case, were made in 1961, 1965, 1969 and 1971.

plaintiffs submit that the purpose of the statute is clear from the unambiguous language employed and from the natural and unavoidable effect of the statute. State of Wisconsin v. J.C. Penny Co., 311 U.S. 435, 443-444 (1941). The purpose of sec. 245.10 is simply to prohibit the marriage of those persons who are unable to comply with their prior support obligations or who are unable to pay enough support to assure that their children are not and are not likely to become public charges. The Legislature must be presumed to have intended what it did in fact accomplish. All that is accomplished by sec. 245.10 is the prohibition of marriage by those who are financially unable to meet the standards of the statute.

Plaintiffs do not dispute that sec. 245.10 is an effective means of preventing many Wisconsin residents from lawfully marrying. The statutory procedure acts as a net; all plaintiff class members and their intended spouses must pass through it so that the State can identify and prohibit the marriage of those whom it has decided may not marry. However, the purpose of denying to certain indigent persons the right to marry is not a legitimate state purpose.

The right to marry is a well-established, constitutionally protected right. If a law has no other purpose than to deny a constitutional right, it is "patently unconstitutional." Shapiro v. Thompson, 394 U.S. at 631; United States v. Jackson, 390 U.S. 570, 581 (1968). If the purpose of sec. 245.10 is to deprive a class of citizens of the right to decide when and whom to marry, it must fail.

Furthermore, if the purpose of the law is to deny the right to marry to poor members of the plaintiff class, then the purpose of the law is to discriminate against a class of poor persons. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between the 'rich' and 'poor' as such in the formulation and application of their laws." Douglas v. People of State of California, 372 U. S. 353, 361 (1963) (Clark, J. dissenting) (emphasis in original).

Because the statute focuses upon the support obligation, it might be argued that the purpose of the statute is to protect the welfare of children by enforcing the parental obligation to support. But this argument is rebutted by the terms of the statute itself. The only authority given to the court in a permission to marry proceeding is authority to grant or withhold permission to marry. The court may not actively enforce the support obligation in any way. If the legislature had intended sec. 245.10 as a support enforcement tool, it would have given the court the power to in fact enforce support.

Assuming for argument that the purpose of sec. 245.10 is to enforce the parental duty of support and assuming that support enforcement is a compelling state interest, sec. 245.10 is not necessary to the accomplishment of this purpose. A brief survey of Wisconsin statutes establishes that the state has many potent means of enforcing a parent's obligation to support his or her children. If the child or children in question are issue of a former marriage, WIS. STAT. sec. 247.232 and sec. 245.265 (1975), give the judge and family court commissioner authority to order the parent to

execute a wage assignment to assure that future support payments will be made regularly and that arrears will be paid. WIS. STAT. sec. 247.37 (1) (a) (1975), requires the judgment of divorce to include a provision warning that disobedience of the court's order is punishable under WIS. STAT. sec. 295.03 (1975), by commitment to the county jail or House of Correction until the judgment is complied with. WIS. STAT. sec. 295.03 (1975), contains a provision excepting contempt actions in divorce or legal separation cases from the usual requirement of proof of personal demand of payment and refusal to pay. Where the order of support results from an adjudication in a paternity proceeding pursuant to Chapter 52 of the Wisconsin Statutes, the court's powers to enforce its support orders are similar, in that the court has the power to order the parent to execute a wage assignment, WIS. STAT. sec. 52.21(2) (1975), or to commit the parent to the county jail, WIS. STAT. sec. 52.40 (1975). In both divorce and paternity actions, the court may at any time modify the judgment to increase the support order as the circumstances of the parent allow. WIS. STATS. sec. 247.25, sec. 52.38 (1975).

In addition to these civil remedies, the State may proceed against a non-supporting parent criminally under WIS. STAT. sec. 52.05 (1975), which makes abandonment of a minor child, whether born in or out of wedlock, a felony, or under WIS. STAT. sec. 52.055 (1975), which makes failure to support a minor child a misdemeanor. In either criminal action, the court may, in lieu of penalty, place the defendant on probation on condition that he or she pay a certain sum as support. If the defendant on probation fails to support as ordered, the court may then proceed on the original charge,

enforce the suspended sentence, or punish the defendant for contempt and commit him to the county jail under WIS. STAT. sec. 52.08 (1975), the work release law.

Finally, Congress has recently acted to provide substantial assistance to the states and to the custodians of children in collecting parental support. Besides providing financial assistance to states in locating parents and enforcing support, Congress has authorized various federal agencies to assist states and custodians in locating parents and has authorized the federal courts to hear certain support enforcement actions. 42 U.S.C. sections 602 et seq., (Supp. 1976).

It might be argued that the knowledge that permission to marry can be denied encourages parents to comply with the court ordered support obligation. However, considering the other support enforcement tools available in Wisconsin, such "encouragement" can hardly be considered necessary. It might also be argued that sec. 245.10 encourages non-custodial parents to agree to pay more support than the court had ordered so that their children would not be public charges and permission to marry will be granted. However, parents in Redhail's situation are rarely able to pay more support. [19]

[19] It is noteworthy that all of Wisconsin's methods of determining and enforcing the support obligation take into account the income and assets of the non-custodial parent. E.g. WIS. STATS. 247.24(1)(a); sec. 247.32; sec. 52.21(2) (1975); Kutzik v. Kutzik, 21 Wis. 2d 442, 124 N.W. 2d 581, 585 (1963). The amount of support ordered generally represents the court's considered opinion as to what the individual is reasonably

Further, those persons who arguably could pay more support are forced into making a choice; they must either give up their constitutional right to marry or give up their statutory right to have their support obligation determined by a court in the statutory procedure based on the statutory factors. The state may not, under the United States Constitution, require an individual to make such a choice. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972).

Therefore, if sec. 245.10 was intended as an indirect method of support enforcement, the State clearly has numerous effective ways to assure that all parents will support their children to the best of their ability without abridging the right to marry.

Since the statute requires that the parent prove that the children are not and are not likely to become public charges in order to obtain permission, it might be argued that the purpose of the statute is to prevent children from becoming public charges. This argument is somewhat supported by dictum in the Wisconsin Supreme Court decision of Beberfall

(footnote 19 cont'd)

able to pay. Yet, if that amount is not sufficient to keep the children off welfare, permission to marry will be denied. An indigent support-owing parent cannot be held in contempt of court for failure to pay support because this failure would not be "willful." O'Connor v. O'Connor, 48 Wis. 2d 535, 180 N.W. 2d 735 (1970), yet sec. 245.10 contains no analogous safeguard.

v. Beberfall, 54 Wis. 2d 229, 195 N.W. 2d 625, 629 (1972).[20]

> "The policy behind this statute is to make certain that the children of the first marriage are not to become public charges."

The interest in preventing children from becoming public charges is similar to the interest in enforcing the parental duty to support. It is also clearly related to Wisconsin's interest in saving welfare costs. Plaintiffs have demonstrated that sec. 245.10 is not intended as a support enforcement tool and that, even if it were intended to enforce support, it is not necessary to the accomplishment of that purpose. The argument that preventing children from becoming public charges justifies sec. 245.10 shares these defects. Furthermore, it is well-settled that the saving of welfare costs is not a compelling state interest and will not justify the infringement on plaintiffs' fundamental right to marry.

> "We recognize that a state has a valid interest in the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures,

[20]The only other Wisconsin Supreme Court statement of the legislative purpose of sec. 245.10 is found in State v. Mueller, 44 Wis. 2d 387, 171 N.W. 2d 414 (1969):

> ". . . the interest Wisconsin seeks to protect is a legitimate and substantial protectable interest both as to the protection of the welfare of its minors and the marriage relationship of its residents. . ." 171 N.W. 2d at 418.

This statement of purpose is too vague to be helpful.

> whether for public assistance, education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification."
> Shapiro v. Thompson, 394 U.S. at 633.

Finally, it might be argued, based upon the notes of the original drafting committee, that the purpose of sec. 245.10 is to require counseling regarding the importance of meeting support obligations.[21] However, the statute itself has nothing to do with counseling.

Even if the purpose of sec. 245.10 were to provide counseling, it could not justify the statutory classification. As the District Court noted, counseling is not a compelling state interest and the statute is not "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155.

It is clear that the State of Wisconsin can achieve all of the possible permissible objectives of sec. 245.10 without interfering with the fundamental right to marry. It is important to note that while every other state presumably has the same interests as the State of Wisconsin in the marital relationship and the support of children, plaintiffs have been unable to find any other state with the same statutory requirement. Apparently, the legislatures of the other forty-nine states have not found such a restriction to be necessary to promote any legitimate state interest.

[21]Defendants no longer raise this argument in justification of this statute.

D. Section 245.10 does not rationally further any legitimate state interest.

The statutory classification created by sec. 245.10 does not rationally further any legitimate, articulated state purpose and therefore cannot withstand even the less stringent "rational relationship" standard of equal protection analysis. San Antonio Ind. School District v. Rodriguez, 411 U.S. at 17; Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Defendants argue that Wisconsin's interest in protecting children provides more than a reasonable basis for the statutory classification. (Brief of Appellants, 15). But nowhere do they explain just what the relationship is between the broad interest in the protection of children and the permission to marry law.

Plaintiffs have illustrated that the purpose of the statute is to prevent the marriage of those persons who have been unable to comply with existing support orders or who are unable to pay enough support to keep their children from becoming public charges. A law which has as its purpose the denial of the right to marry to indigent persons is doubly unconstitutional; the denial of constitutional rights is not a legitimate state purpose, and states may not formulate and apply their laws to discriminate against the poor.

It might be argued that sec. 245.10 protects children by prohibiting poor parents from marrying, thereby preventing them from ta' ing on new financial obligations which would interfere with their ability to comply with existing obligations. The statute was first enacted in 1959 when, in the great majority of divorces, the mother was awarded custody of the children and the father was orderd

to pay support. E.g. Welker v. Welker, 24 Wis. 2d 570, 129 N.W. 2d 134 (1964). Perhaps the legislature assumed that the support-obligated father would by marriage necessarily become responsible for the financial support of his new wife and therefore be less able to provide for his children. However, this is precisely the sort of legislative assumption which the Court has held to be an insufficient basis for statutory classifications. E.g., Califano v. Goldfarb, ____U.S. ____, 97 S.Ct. 1021, 1025-1027 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 643-646 (1975). It is true that, by marriage, a father takes on the legal obligation to support his new spouse. However, the duty of spousal support extends to both partners in the marriage. WIS. STAT. sec. 52.01 (1975). In fact, the likelihood of a work'ng spouse[22] makes it reasonable to believe that many plaintiffs would actually improve their financial situation through marriage and thus be better able to support their children.

While the marrying parent and new spouse may proceed to have children, many couples, of course, do not. And many people proceed to have children without the benefit of marriage. According to Public Health Statistics - Wisconsin 1974, six

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[22]In 1975, 44.4% of all married women were working outside the home. See, A Statistical Portrait of Women in the United States, 1975 U.S. Department of Commerce, Bureau of Census (Current population reports: Special Studies: Series P'23; no. 58). Table 7-4, p. 30.

thousand five hundred ninety-four children were born to unmarried parents in Wisconsin in that year. Since a parent has an obligation to support an out of wedlock child, it is clear that sec. 245.10 does not prevent people from incurring new support obligations.

Furthermore, many people who are required to obtain court permission to marry attempt to marry in other states without permission.[23] While these marriages are declared void by sec. 245.10 (5), the duty of spousal support exists unless and until the marriage is annulled and may continue after any judgment of annulment. WIS. STAT. sec. 247.245 (1975).

Plaintiffs have argued that sec. 245.10 is not intended as a means of enforcing the parental duty to support. But assuming for argument that the statute is intended to promote the welfare of children by enforcing the parental duty of support and preventing children from becoming public charges, it is ineffective. Those parents who can demonstrate that they have fully complied with the prior support order and whose children are not, and are not likely to become public charges are subjected to the delay of the court proceedings as well as the requirement that they disclose their financial resources to the court before they are allowed to marry. This delay and disclosure, while burdensome to the individual, accomplishes nothing for the children or for the State.

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[23] See In re Parson's Trust, 56 Wis. 2d 613, 203 N.W. 2d 40 (1973); State v. Mueller, 44 Wis. 2d 387, 171 N.W. 2d 414 (1969).

Those parents who cannot make the requisite showing are totally denied the right to marry for as long as they continue to be residents of Wisconsin. This accomplishes nothing towards promoting the interest in support enforcement. The children of persons who are denied permission to marry, whether because the parent is behind in support payments or because the children are public charges, are simply unaffected by the procedure. If permission to marry is denied, the back support will still be owing; the child will still receive public assistance. If the State or the child's custodian believes that the support-obligated parent might be able to pay the arrearages or be able to pay an increased support order, resort must still be had to one of the support enforcement tools available under Wisconsin law.

Plaintiffs have contended that despite the notes of the Drafting Committee, the terms of sec. 245.10 preclude any argument that its purpose is to provide mandatory counseling to prospective marriage partners. If this were the purpose, the statute would be completely irrational. Assuming for argument that the State has a legitimate interest in providing counseling before marriage to persons with pre-existing support obligations, sec. 245.10 does not require or even provide that plaintiffs submit to counseling nor does it require the court hearing the petition for permission to marry to counsel the petitioner regarding his or her support obligations. The statutory requirements are limited to an examination of the petitioner's compliance with the support order and of his or her ability to provide enough support to prevent the children from becoming public charges. Indeed, the statute allows the court to waive the hearing if it is satisfied from court records, family support records,

and the petitioner's financial disclosure that the statutory requirements are met. The hearing offers the only opportunity for counseling the marriage license applicants. Therefore, if the purpose of the statute were to provide counseling, allowing waiver of the hearing would defeat the purpose of the statute.

III. SECTION 245.10 DEPRIVES PLAINTIFFS OF LIBERTY WITHOUT DUE PROCESS OF LAW.

The right to independence and freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974); Roe v. Wade, 410 U.S. at 153. The District Court found that the statutory classification created by sec. 245.10 impermissibly abridges plaintiffs' right to marry in violation of the Equal Protection Clause. Plaintiffs submit that sec. 245.10 also abridges their right to marry in violation of the Due Process Clause.

Many of this Court's decisions invalidating statutes or regulations which interfered with the right of privacy have relied on due process grounds. Cleveland Board of Education v. LaFleur; Roe v. Wade; Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923). Some matters are so personal, so basic to our society and our society's concept of liberty that due process prohibits unnecessary state interference with individual choice.

The cases cited above establish that the right of privacy encompasses the decision to marry as well as matters involving contraception, procreation, family relationships and child rearing and education. Paul v. Davis, 424 U.S. 693, 712-713 (1976). These cases also establish that states may abridge the right of privacy only where necessary to promote a compelling state interest, Roe v. Wade, 410 U.S. at 155, (citing Shapiro v. Thompson, 394 U.S. at 634), and then only to the extent necessary to achieve that interest. Shelton v. Tucker, 364 U.S. 479 (1960). This test is the same as the "strict scrutiny" equal protection test.

Plaintiffs have demonstrated that sec. 245.10 substantially abridges not only their right to marry, but also the right of their intended marriage partners. A statute which requires an otherwise qualified adult to seek the permission of the court to marry, which mandates that a person prove to the court that he or she is financially able to marry and which often denies the right to marry because of poverty, surely invades the zone of privacy.

Plaintiffs have also demonstrated that the permission to marry law is not necessary to promote any compelling state interest because the state has means of achieving each possible legitimate objective of sec. 245.10 without abridging the right to marry. For these reasons, sec. 245.10 is invalid as a violation of the Due Process Clause of the Fourteenth Amendment.

IV. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT ABSENT DEFENDANT CLASS MEMBERS NEED NOT BE GIVEN NOTICE.

A. No case or controversy exists between the representative defendant and the plaintiffs on this issue.

In addressing the class action issue, plaintiffs first question whether the requisite case or controversy under Article III of the Constitution exists between the plaintiffs and the named defendant. The named defendant by counsel and the Wisconsin Attorney General participated in this litigation from beginning to end. They now ask this Court to reverse the District Court because parties other than themselves did not receive notice and were presumably thereby somehow harmed. But the named defendant has absolutely no "personal stake in the outcome" of this issue. Baker v. Carr, 369 U.S. 186, 204 (1962). The judgment of the District Court, if it is correct, will be binding upon him. Further, none of the unnamed defendants have, either in the District Court or in this Court, alleged their rights were violated or that any harm was done to them. Nor has the representative defendant pointed to any harm done to those unnamed.[24] This Court therefore is being

[24] In its pre-trial order of February 20, 1975, the District Court invited counsel for the named defendant and the Wisconsin Attorney General to submit in writing any objections to the case being maintained as a class action with respect to the defendants. Neither counsel for the named defendant nor the Wisconsin Attorney General, who participated in the pre-trial conference, filed an

asked to rule on a claim based on "speculation and conjecture." O'Shea v. Littleton, 414 U.S. 488, 497 (1974). If any of the unnamed class members take the position that they should not be bound by the judgment they can raise this argument by collateral attack. Advisory Committee Note, 39 F.R.D. 73, 106 (1966).

B. Neither the Due Process Clause nor Fed. R. Civ. P. 23(d) required the District Court to provide notice to the unnamed defendant class members.

Defendants rely solely on Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974) and Fed. R. Civ. P. 23(c)(2) as authority for the argument that Rule 23 and due process require that notice be given to the absent members of the class in this case.[25] (Brief of Appellants, 18-19). Defendants' reliance is misplaced because the

(footnote 24 cont'd)

objection. (A. 19-20). Instead, counsel opposed waited six months to voice their concern regarding lack of notice at the oral argument before the three-judge panel on the merits of the case. Even then they did not indicate the reason for their objection. (A. J.S. 5).

[25] Defendants' arguments sweep broadly and could be interpreted to advance the proposition that due process requires notice to all class members in every class action. (Brief of Appellants, 17-19). However, in light of the uniqueness of this position, the brevity of defendants' argument, the lack of authority cited and the recent authority contra, plaintiffs presume that defendants' due process claim is limited to the facts of this case. Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975). See also,

present action is a Rule 23(b) (2) class action.[26] The mandatory notice provision of Rule 23 (c) (2) applies only to 23(b) (3) actions. The decision in Eisen is specifically limited to (b) (3) actions and did not discuss notice requirements in (b) (2) cases. 417 U.S. at 178 n. 14.

The provision of notice to class members in (b) (2) actions is governed by 23(d) and, of course, the Due Process Clause. Neither due process nor Rule 23 require that notice be given to each member of every (b)(2) class. Hansberry v. Lee, 311 U.S. 32, 42-44 (1940); Note, The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23, 123 U. Pa. L. Rev. 1217, 1226-1227 (1975); Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45 (1967); Benett, Eisen v. Carlisle and Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy, 1974 Wis. L. Rev. 801, 805; Miller, Problems of Giving Notice in Class

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(footnote 25 cont'd)
Hanna v. Plumer, 380 U.S. 460, 471 (1965), holding that there is a strong presumption as to the constitutionality of the Federal Rules of Civil Procedure.

[26] Defendants have not appealed the District Court's finding that they constitute an appropriate class under Fed. R. Civ. P. 23(a) and (b) (2). Three of the prerequisites of 23(a), commonality, typicality and adequacy of representation, and the requirement of 23(b) (2) that the party opposed has acted on grounds applicable to all class members, provide considerable protection of the interests of unnamed parties. See Advisory Committee's Note, 39 F.R.D. 73, 100, 102 (1966).

Actions, 58 F.R.D. 313, 314-315 (1973); 3B Moore's Federal Practice, Paragraph 23.55.

In determining what orders are necessary for the protection of unnamed members of a particular (b) (2) class, the court should consider all circumstances present in that case. Frankel, Some Preliminary Observations Concerning Rule 23, 43 F.R.D. at 45-46. A consideration of the facts in this case inexorably leads to the conclusion that notice to the unnamed defendants was not required:

1. The interest of each defendant class member in the suit was identical. Each of the seventy-two counties in the State of Wisconsin has a county clerk. These clerks comprise the class of defendants in this action. Each is prohibited by sec. 245.10 from issuing a marriage license absent the court order required by that statute. The only issue for decision on the merits in the case is whether each of the members of the class of defendants acted in a constitutionally permissable manner in refusing to issue a marriage license pursuant to sec. 245.10. The claim by the plaintiffs against each defendant is one and the same. No variation of facts in any individual case is significant.

2. The absent defendant class members were adequately represented. As the District Court noted in its opinion, the Milwaukee County Corporation Counsel, which represented the named defendant, is experienced in conducting federal litigation. (A.J.S. 5-6). In addition, Attorney Joseph Salituro, Assistant Corporation Counsel for Kenosha County, Wisconsin, appeared and participated in defense of the Kenosha County Clerk in Leipzig v. Pallamolla, 418 F. Supp. 1073 (E.D. Wis. 1976),

a companion case to the case at bar which raised identical issues and was consolidated with the present case by order of the District Court. (A. 19). The Attorney General of the State of Wisconsin also took an active part in the defense of the named and unnamed defendant class members. (A. J. S. 6). The Wisconsin Attorney General is statutorily charged with the duty of representing the people of Wisconsin in certain civil and criminal cases. WIS. STAT. sec. 165.25, (1975).[27] Therefore, defendants were represented by counsel from three separate government offices, one of which has statewide responsibility to defend the laws of Wisconsin.

The District Court found at the conclusion of the case that the unnamed defendants had been adequately represented throughout the litigation, after all pleadings and briefs had been submitted and oral argument made. (A. J. S. 5-6).

Moreover, counsel opposed have not even suggested that their representation of the unnamed class members was less than adequate.

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[27]The provisions of 28 U. S. C. 2284 which were in effect at the time of the commencement of this action required that the Attorney General receive notice of any action involving the enforcement of a state statute. Pub. L. 86-507, sec. 1 (19); 74 Stat. 201. The notice requirement was complied with. The purpose of the provision was obviously to give state attorneys general an opportunity to defend the enactments of their legislatures.

The record both below and in this Court is barren of complaints by unnamed class members concerning the adequacy of representation, although each class member received a copy of the judgment. The conclusion is inescapable that the unnamed class members did receive adequate representation.

3. The statute in question is one of statewide applicability and reflects the judgment of the Wisconsin Legislature on a matter of state policy. The members of the defendant class have the duty to implement the statute in question because under Wisconsin law county clerks, and not state officials, are responsible for the issuance of marriage licenses. WIS. STAT. sec. 245.05 (1975). There is no local option not to enforce the law. The county clerks are simply acting as agents of the State when they refuse to issue marriage licenses under sec. 245.10 (1971). That being the case, representation of them by the Wisconsin Attorney General is not only adequate but most appropriate, for the Wisconsin Supreme Court has held that in Wisconsin,

> "It is the attorney general who should be afforded the opportunity to act in a representative capacity in behalf of the legislature and the people of the state to uphold the constitutionality of a statute of statewide application." City of Kenosha v. Dosemagen, 54 Wis. 2d 269, 195 N. W. 2d 462 (1972)

4. Defendant class members would have gained nothing by receiving notice. Defendants have not alleged in any of their arguments that they were prejudiced by the action of the District Court. They were not free to "opt out" under Fed. R. Civ. P. 23 (c) (3), this being a 23 (b) (2) class. The District Court ruled that they would not be allowed to intervene. (A. J. S. 9).

The case could not have been compromised without notice under 23(e). Therefore, defendants had nothing to gain by notice but the opportunity to raise arguments in defense of the constitutionality of the statute which had already been raised by the three attorneys representing them. One of the express purposes of the grant of discretion found in 23(d) is to give the court authority to limit redundant arguments. See, Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. at 41-42.

This Court has ruled that lower courts may handle procedural matters in a manner which will insure the orderly transaction of business and that such decisions are not reviewable by the Supreme Court absent a showing of substantial prejudice. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), citing NLRB v. Monsanto Chemical Co., 205 F.2d 763 (8th Cir. 1953). There is simply no such showing by the defendants here.[28]

Further, the Court has made clear that in analyzing whether the requirements of due process have been satisfied in any decision-making process, it will consider the fairness of the existing procedures and the probable value of additional safeguards against the administrative burden and other societal costs of requiring further procedural protections. Mathews v. Eldridge, 424 U.S. 319 (1976).

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[28]Were this Court to find that the District Court was in error in failing to notify unnamed defendants it is still bound to affirm absent a showing that the lower court's error substantially affected the rights of the defendants. 28 U.S.C. 2111.

Here, notice to the unnamed class members would have amounted to nothing more than a substantial administrative burden on an already overworked panel of three federal judges. See, Burger, C.J., Chief Justice Burger Issues Yearend Report, 62 A.B.A.J. 189 (February, 1976); Burger, C.J., Annual Report on the State of the Judiciary, 62 A.B.A.J. 443, 444-445 (April, 1976).

To summarize, it would seem that the Advisory Committee had the type of class which the defendants constitute in mind when it stated in its comments on Fed. R. Civ. P. 23(d)(2) that: "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Advisory Committee's Note, 39 F.R.D. 69, 106 (1966).

Finally, in their brief at 19, counsel opposed ask this Court to reverse the judgment of the District Court. Conceding for argument that notice should have been given to the unnamed defendants, plaintiffs submit that those parties who appeared would still be bound by the District Court's judgment and that it would be appropriate for this Court to vacate and remand only that part of the lower court's judgment which affects the class members who did not receive notice.

CONCLUSION

For the foregoing reasons, appellees respectfully move this Court to affirm the judgment of the District Court.

Respectfully submitted,

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